

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MEDZILLA, INC.,

Plaintiff,

v.

SCISTAFF SERVICES LLC, a New Jersey  
limited liability company;  
LEADINGSCIENCE.COM, a Massachusetts  
sole proprietorship corporation; S.J.  
McKEARNEY, INC., a Massachusetts  
corporation; and SCOTT McKEARNEY, an  
individual,

Defendants.

No. C06-506-MJP

ORDER DENYING SCISTAFF  
SERVICES, LLC'S MOTION TO  
DISMISS CROSS-CLAIM OR  
SEVER AND TRANSFER CROSS-  
CLAIM

Third-Party Defendant SciStaff Services LLC ("SciStaff") seeks dismissal of the claim filed against it by Defendant/Third-Party Plaintiff S.J. McKearney, Inc. ("McKearney Inc.") or, in the alternative, that the claim be severed and either transferred or stayed. For the reasons stated below, the Court finds SciStaff's grounds for dismissal and severance to be unpersuasive, and therefore DENIES the motion.

**Background**

SciStaff is a one-man operation licensed as a limited liability corporation in New Jersey. Their business is placing biotech and pharmaceutical professionals in jobs. They have no office, employees, property or presence in the State of Washington, and do not solicit business here. Medzilla is a Washington corporation dedicated to warehousing electronic resumes.<sup>1</sup> SciStaff contracted with Medzilla for monthly access to their database. Among the contract provisions

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<sup>1</sup> McKearney Inc. claims that the Medzilla resume database is located in Washington, but (as SciStaff points out) provides no proof of that claim.

1 were agreements that Washington law would govern, that disputes would be litigated in King  
2 County, and that only SciStaff would use the database access code which Medzilla provided.

3 McKearney Inc. was an independent sub-contractor intermittently hired by SciStaff and  
4 paid on a contingency basis. They had no written agreement. In April, 2006, Medzilla sued  
5 SciStaff, McKearney Inc. and others for violations of federal and state statutes related to allegedly  
6 improper access of Medzilla's database. Medzilla and SciStaff settled their portion of the case  
7 and SciStaff was dismissed as a defendant in July, 2006. In November 2006, an answer was filed  
8 on behalf of the remaining defendants, at which time McKearney Inc. asserted a "cross-claim" for  
9 indemnification against SciStaff, claiming that it had acted as SciStaff's agent. It is that claim  
10 which SciStaff seeks to dismiss by this motion.

11 SciStaff seeks dismissal on several grounds:

- 12 1. Under FRCP 12(b)(2), for lack of personal jurisdiction
- 13 2. Under FRCP 12(b)(3), for improper venue
- 14 3. Under FRCP 13(g), because they are improperly named as a "co-party"
- 15 4. Under 28 U.S.C. § 1367(c)(1), because the cross-claim raises a "novel and  
16 complex issue" of New Jersey law.
- 17 5. Alternatively, severance and transfer to the U.S. District Court for the District of  
18 New Jersey is sought under 28 U.S.C. § 1404 or 28 U.S.C. § 1406.

19 The analysis will address each ground separately.

## 20 **Analysis**

### 21 Personal Jurisdiction

22 Both sides are in agreement that no general personal jurisdiction exists – SciStaff does not  
23 have "substantial and continuous activities" within Washington. Pac Atlantic Trading Co. v.  
24 M/V Main Express, 758 F.2d 1325, 1327 (9th Cir. 1985).

25 SciStaff argues further there are no grounds upon which to exercise specific personal  
26 jurisdiction and the Court must disagree. The elements of specific personal jurisdiction are:

1. Purposeful availment of the privilege of conducting business within the forum
2. Claims arising out of forum-related activities
3. Reasonableness in the exercise of jurisdiction

Doe v. Unocal Corp., 248 F.3d 915, 923 (9th Cir. 2001).

SciStaff did purposefully avail itself of the privilege of conducting business here when it contracted with Medzilla, a Washington corporation, to access its database of resumes. Furthermore, it agreed to be governed by Washington law and to try any claims arising out of the contract in King County, Washington. McKearney Inc.'s claims against SciStaff arise out of activities related to that agreement: although SciStaff correctly points out that there is no evidence that the actual database is housed here, Medzilla's presence in this forum – creating, updating and maintaining the database, wherever it is – is sufficient forum-related activity. And it is reasonable that, having contracted with a Washington business (and having agreed to Washington law and forum provisions), SciStaff should be subject to this forum's jurisdiction when contract-related claims arise.

#### Venue

SciStaff presents its venue argument as though it were a first-party defendant answering a suit by a first-party plaintiff, pointing out that the company has no business presence in Washington and none of the events related to McKearney Inc.'s indemnification claim occurred here. McKearney, Inc. responds as though it were a first-party plaintiff trying to defend its choice of forum.

Neither party appears to have grasped the fact that, as a third-party defendant, SciStaff cannot avail itself of traditional venue analysis. A number of federal jurisdictions hold that "the reasons which give the court jurisdiction over an ancillary proceeding by virtue of its jurisdiction over the principal action, likewise support the conclusion that venue in the ancillary proceeding may depend or rest upon the venue in the main proceeding." U.S. v. Acord, 209 F.2d 709, 714 (10th Cir. 1954)

Since the Court has subject matter jurisdiction over Medzilla's and McKearney Inc.'s claims (either independently or on an ancillary basis) and has personal jurisdiction over SciStaff,

1 “statutory venue limitations have no application to [FRCP] 14 claims even if they would require  
2 the third-party action to be heard in another district had it been brought as an independent  
3 action.” Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1445. See Gundle  
4 Lining Const. Corp. v. Adams County Asphalt, Inc., 85 F.3d 201, 209-210 (5th Cir. 1996)  
5 (disallowing a motion to transfer venue by a third-party defendant over whom the court had  
6 personal jurisdiction).

7 “Co-party” or third-party defendant

8 SciStaff points out that, since they were not a party to the case at the time when  
9 McKearney Inc.’s cross-claims were filed (they had already settled Medzilla’s claims against  
10 them), they are not properly named as “co-parties” as required by FRCP 13(g). On this basis,  
11 SciStaff claims a right to be dismissed. McKearney Inc. concedes that it was an error to designate  
12 their claim against SciStaff as a cross-claim and asks the Court to exercise its discretion to re-  
13 designate their pleading as a third party claim under FRCP 14.

14 There is precedent for this. In Raytheon Aircraft Credit Corp. v. Pal Air Intern, Inc., 923  
15 F.Supp. 1408 (D. Kan. 1996), the court opted to remedy an improper filing of a cross-claim by  
16 treating it as a third-party pleading under FRCP 14 and re-designating the parties in the caption.  
17 Such a result here would not offend principles of equity or due process. But for SciStaff settling  
18 its claims prior to McKearney Inc. filing its answer, it would have been properly named as a co-  
19 party. SciStaff has adequate notice of the existence of the lawsuit and the issues and claims.  
20 McKearney Inc. will be permitted to amend their pleading to re-designate SciStaff as a third-party  
21 defendant.

22 Supplemental jurisdiction

23 SciStaff argues that because McKearney Inc.’s indemnification claim pertains to limited  
24 liability companies, it involves a “novel or complex issue of State law” and on that basis  
25 supplemental jurisdiction may and should be declined under 28 U.S.C. § 1367(c)(1). There is  
26 general agreement between the parties that New Jersey law applies to this question; what this  
27 motion puts at issue is whether the Court should retain jurisdiction or either dismiss the claim or  
28 transfer it to New Jersey federal court.

1 The Court recognizes that retention of supplemental jurisdiction is a matter of discretion,  
2 not of right. In re Latex Glove Products Liability Litigation, 373 F.Supp.2d 1205, 1207  
3 (W.D.Wash. 2005). Jurisdiction may be declined on a statutory basis (such as SciStaff seeks  
4 here) and may also be refused in consideration of issues of economy, convenience, fairness, and  
5 comity. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Executive Software North  
6 Am., Inc. v. U.S. District Court, 24 F.3d 1545, 1555-57 (9th Cir. 1994).

7 SciStaff bases its argument that McKearney Inc.'s third-party claim raises a "novel and  
8 complex" issue of New Jersey law on two grounds. First, the language of New Jersey limited  
9 liability company law regarding indemnification is permissive ("may, and shall have the power to,  
10 indemnify")<sup>2</sup> rather than mandatory.<sup>3</sup> Second, the issue of a limited liability company's  
11 indemnification obligations appears to be one of first impression in New Jersey.

12 But New Jersey has long recognized that common law principles of indemnification  
13 govern in the absence of express provisions to the contrary. Mettinger v. Globe Slicing Mach.  
14 Co., Inc., 153 N.J. 371, 380 (1998) (citing Promaulayko v. Johns Manville Sales Corp., 116 N.J.  
15 505, 510-11 (1989)). And it is also the law of that jurisdiction that in order for a statute to  
16 supercede or nullify the common law, it must express or specifically do so. Matter of Tierney,  
17 175 N.J. Super. 614, 623 (1980). SciStaff has cited to no provision of New Jersey's limited  
18 liability company statutory scheme overruling the common law indemnification principles  
19 governing that state's jurisprudence.

20 As both parties have pointed out, New Jersey law recognizes that an independent  
21 contractor can be a principal's agent. Sodexho Operations, LLC v. Director, Division of  
22 Taxation, 21 N.J. Tax 24, 38-39 (Tax Ct. 2003). At this juncture, the resolution of the issue is  
23 simply a matter of applying the facts of this case to the common law factors enumerated in the  
24 Restatement of Agency § 220(2), as the Supreme Court of New Jersey did in Mavrikidis v.  
25 Petullo, 153 N.J. 117, 132 (1998). This Court adjudges itself as competent to accomplish that

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27 <sup>2</sup> N.J.S.A. 42:2B-10

28 <sup>3</sup> New Jersey corporation law states that a corporation "shall indemnify a corporate agent." N.J.S.A.  
12A:3-5(4).

1 analysis as a court in SciStaff's home state, and therefore sees no need to either dismiss  
2 McKearney Inc.'s claim or transfer it to the federal courts in New Jersey.


3 The Court also finds no merit in SciStaff's suggestion that their portion of the case be  
4 severed and stayed pursuant to FRCP 42 pending resolution of the primary claims between  
5 Medzilla and the remaining defendants. FRCP 42(b) contemplates the furtherance of  
6 convenience, the avoidance of prejudice and the attainment of economy in ordering a separate  
7 trial. To do so in this instance would accomplish none of those goals and would instead  
8 necessitate the re-litigation of common issues should McKearney prevail in the principal litigation  
9 and then have separately prove its right to indemnification.

### 10 Conclusion

11 SciStaff is subject to the personal jurisdiction of this Court and, as a third-party defendant,  
12 is bound by the propriety of venue as determined by the underlying lawsuit. The company is not  
13 entitled to dismissal based on McKearney Inc.'s failure to properly implead them and McKearney  
14 Inc. will be permitted to re-designate SciStaff as a third-party defendant. Finding that this claim  
15 represents neither a novel nor complex issue of state law, the Court chooses to exercise  
16 supplemental jurisdiction over the claims and to consider it simultaneously with the primary  
17 causes of action.

18 SciStaff's motion to dismiss or sever the claims against it is therefore DENIED.

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20 Dated: June \_20\_, 2007

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22   
23 Marsha J. Pechman  
24 U.S. District Judge  
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